UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF COMMERCE

Foothill/Eastern Transportation Corridor Agency
Board of Directors of the Foothill/Eastern Transportation Corridor Agency

Appellants,

vs.

California Coastal Commission

Respondent.

NOTICE OF ADDITIONAL AUTHORITY

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May 16, 2008

Appellants Foothill/Eastern Transportation Corridor Agency and the Board of Directors of the Foothill/Eastern Transportation Corridor Agency (collectively "TCA") provide notice of a recent opinion of the District Court for the Southern District of California that is central to the issues in this appeal. *Manchester Pacific Gateway v. California Coastal Comm'n*, No. 07cv1099, 2008 U.S. Dist. LEXIS 34703 (S.D. Cal. Apr. 25, 2008) (order granting motion for partial summary judgment) is attached hereto and filed as TCA's Supp. App. 6-56. *Manchester Pacific* is controlling authority that supports TCA's position here that the California Coastal Commission exceeded its consistency review authority because land on which the Foothill-Transportation Corridor South Project would be constructed is excluded from the "coastal zone" as that term is defined in the Coastal Zone Management Act ("CZMA").

In *Manchester Pacific,* the plaintiff (a private developer) sought declaratory relief that (1) property owned by the U.S. Navy in downtown San Diego, but leased to the plaintiff for public and private development purposes, was excluded from the CZMA's definition of the "coastal zone," and (2) that the California Coastal Commission could not require the plaintiff to obtain a coastal development permit under California law. The court found that property owned by the Navy and leased to a private party constituted "land[] the use of which is by law subject solely to the discretion of . . . the Federal Government." *Manchester Pacific*, 2008 U.S. Dist. LEXIS 34703, at *10 (quoting 16 U.S.C. §1453(1)). Thus, the district court concluded that the Navy Broadway Complex ("NBC") property was excluded from the CZMA definition of the "coastal zone." Importantly, the court rejected the Coastal Commission's argument that the NBC

property was not subject to the sole discretion of the federal government because federal law and the lease agreement adopted pursuant to federal law expressly conferred significant discretionary authority over the NBC project to non-federal entities. *Manchester Pacific*, 2008 U.S. Dist. LEXIS 34703, at *8.

Manchester Pacific is directly relevant to the issue of whether respondent California Coastal Commission exceeded its consistency jurisdiction concerning the Foothill-Transportation Corridor South Project. The southernmost portion of the Project is located on federal land owned by the U.S. Navy and on an easement to be granted by the Navy to the TCA. *See* TCA Principal Br. at 11–13; TCA Reply Br. at 2–4.

In an argument strikingly similar to its argument in the current appeal (*see* CCC Principal Br. at 10–11), the Commission argued before the district court that the disputed property was not subject solely to the discretion of the Federal Government because non-federal entities would exercise discretion over the development of the property. *Manchester Pacific*, 2008 U.S. Dist. LEXIS 34703, at *8. The district court concluded, however, that the fact that other entities would be involved in planning for the project did not diminish the Secretary of the Navy's exercise of sole legislative and administrative discretion in authorizing the project. *Id.* at *9.

The facts in *Manchester Pacific* are directly analogous to those here. As in *Manchester Pacific*, Congress has enacted legislation authorizing the Navy to grant a real property interest to a non-federal entity (here the TCA) to construct a project on federal land. *See* TCA Principal Br. at 3, 7. As in *Manchester Pacific,* the revenue from the Foothill-Transportation Corridor South Project will be used to provide improvements for the use of the Navy. *See* TCA Principal Br. at 7-8.

The district court further rejected the Commission's argument that the California Coastal Act provides broader jurisdiction over federal lands than the federal Coastal Zone Management Act. *Manchester Pacific*, 2008 U.S. Dist. LEXIS 34703, at *11. This determination is relevant because the Commission made the same argument in the present matter. *See* CCC Principal Br. at 9.

Manchester Pacific is consistent with the long-established position of the United States that all federally owned lands are excluded from the coastal zone regardless of the character of the Federal Government's jurisdiction over such lands:

> In short, the plain language of the [CZMA] appears to exclude all lands owned by the United States, since the United States has full power over the use of such lands and "sole discretion" with respect to such use. This conclusion is supported by the legislative history of the Act. Nowhere is there any suggestion that Congress intended to exclude some federal land from the Coastal Zone, and hence from State regulation, while including other such land within the Zone. We might add that the results of such an intent would be whimsical; as the submission of the Department of Defense notes, by way of example, part of the Naval base at Sewells Point in Norfolk is subject to exclusive federal legislative jurisdiction, part is subject to concurrent jurisdiction and part is held in a purely proprietary capacity.
>
> Accordingly, it is my opinion that the exclusionary clause excludes all lands owned by the United States from the definition of the Coastal Zone.

Letter from Office of Legal Counsel, U.S. Department of Justice to General Counsel, National Oceanic and Atmospheric Administration (August 10, 1976) (footnotes omitted) (attached and filed as Supp. App. 6-57); *see also*, S. Rpt. 92-753 (1972) *reprinted in* 1972 U.S.C.C.A.N. 4776, 4783; H.R. Rpt. No. 92-1544, at 12 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4793; National Oceanic and Atmospheric Administration Interim Final Rule Relating to Approval Requirements for State Coastal Zone Management Programs, 43 Fed. Reg. 8378, 8388 (March 1, 1978) ("With respect to the commentator's concern about Federal lands leased to private

parties, NOAA's position is that the lands themselves, if owned by a Federal agency, regardless of whether leased to a private party, are excluded."). Thus, contrary to the Coastal Commission's claim in the pending appeal, the area of the Foothill-Transportation Corridor South Project on Camp Pendleton is excluded from the "coastal zone" despite the fact that the area is temporarily leased to the California Department of Parks and Recreation and despite the temporary retrocession of the leasehold.

Manchester Pacific and the other authorities noted above establish clearly that the Secretary should override the Commission's objection because the Commission's consistency review violated the CZMA.

Dated: May 16, 2008

Respectfully submitted:

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The Board of Directors of the Foothill/Eastern Transportation Corridor Agency

TAB 56

1 of 2 DOCUMENTS

MANCHESTER PACIFIC GATEWAY LLC, Plaintiff, vs. CALIFORNIA COASTAL COMMISSION, et al., Defendants.

CASE NO. 07cv1099 JM(RBB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 34703

April 25, 2008, Decided
April 25, 2008, Filed

COUNSEL: [*1] For Manchester Pacific Gateway LLC, a Delaware limited liability company, Plaintiff: Steven M Strauss, LEAD ATTORNEY, Summer J Wynn, Cooley Godward Kronish, San Diego, CA.

For California Coastal Commission, a California state agency, Defendant: Attorney General, LEAD ATTORNEY, State of California, Office of the Attorney General, San Diego, CA; Jamee Jordan Patterson, LEAD ATTORNEY, State of California, San Diego, CA.

For Peter M Douglas, in his capacity as the Executive Director of the California Coastal Commission, Steve Blank, in his capacity as a Commissioner of the California Coastal Commission, Sara Wan, in her capacity as a Commissioner of the California Coastal Commission, Dr. William A Burke, in his capacity as a Commissioner of the California Coastal Commission, Steven Kram, in his capacity as a Commissioner of the California Coastal Commission, Mary K Shallenberger, in her capacity as a Commissioner of the California Coastal Commission, Patrick Kruer, in his capacity as Chair Commissioner of the California Coastal Commission, Bonnie Neely, in her capacity as a Commissioner of the California Coastal Commission, Mike Reilly, in his capacity as a Commissioner of the California [*2] Coastal Commission, Dave Potter, in his capacity as a Commissioner of the California Coastal Commission, Khatchik Achadjian, in his capacity as a Commissioner of the California Coastal Commission, Larry Clark, in his capacity as a Commissioner of the California Coastal Commission, Ben Hueso, in his capacity as a Commissioner of the California Coastal Commission, Sherilyn Sarb, in her capacity as the Deputy Director of the San Diego Coast District Office of the California Coastal Commission, Deborah Lee, in her capacity as the District Manager of the San Diego Coast District Office of the California Coastal Commission, Diana Lilly, in her capacity as a Coastal Planner for the San Diego Coast District Office for the California Coastal Commission, Defendants: Jamee Jordan Patterson, LEAD ATTORNEY, State of California, San Diego, CA.

JUDGES: Hon. Jeffrey T. Miller, United States District Judge.

OPINION BY: Jeffrey T. Miller

OPINION

ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Manchester Pacific Gateway LLC ("MPG") moves for partial summary judgment on its first two claims for declaratory relief seeking (1) a declaration that the Navy Broadway Complex ("NBC") is federally owned land subject solely to federal [*3] discretion such that the NBC site is excluded from the definition of coastal zone under the Federal Coastal Zone Management Act of 1972, *16 U.S.C. § 1451 et seq.* ("CZMA") and (2) a declaration that Defendants cannot require MPG to obtain a Coastal Development Permit ("CDP") under state law. Defendants California Coastal Commission ("Commission"), all twelve members of the Commission (Steve Blank, Sara Wan, Dr. William A. Burke, Steven Kram, Mary K. Shallenberger, Patrick Kruer, Bonnie Neely, Mike Reilly, Dave Potter, Khatchik Achadjian, Larry Clark, and Ben Hueso), and the Executive Director of the Commiussion (Peter M. Douglas) oppose the motion. [1] For the reasons set forth below, the motion for partial summary judgment is granted.

1 On January 15, 2008 the parties jointly dismissed three Commission staff persons (Sherilyn

Sarb, Deborah Lee, and Diana Lilly) from the First Amended Complaint ("FAC").

BACKGROUND

On June 15, 2007, MPG commenced this action seeking, among other things, a declaration that the Commission "cannot require Manchester to obtain a CDP as a condition to Manchester's developing the Project." (FAC P35). MPG contends that the Commission's position with respect to obtaining **[*4]** a CDP violates CZMA. The present action relates to a real estate ground lease entered into between MPG and the Navy on November 22, 2006 for the development of the NBC project on 16 acres of land located in downtown San Diego. (NOL, Exhs. C, D).

In 1987 Congress authorized the Navy to enter into a public-private venture to re-develop the NBC site. The plan allowed the federal government to retain ownership of the land and allow the Navy to obtain replacement office space at no cost to taxpayers. (FAC P10). In June 1987 the Navy and the City of San Diego entered into a Memorandum of Understanding ("MOU") concerning the development of the NBC site. The City and Navy established general guidelines for the project regarding maximum use intensity, building program, architectural standards, building form and scale, site access and parking treatment, and landscape considerations. (NOL, Exh. E).

In August 1990 the Navy completed a Coastal Consistency Determination of the NBC site pursuant to its statutory obligations under the CZMA. The Navy concluded that the project was consistent to the maximum extent possible with California's Coastal Management Program ("CCMP"). (NOL, Exh. F). In 1991, **[*5]** the Commission analyzed and considered the proposed NBC project, concluding that the NBC project was consistent to the maximum extent practicable with the CCMP. (NOL, Exh. G). On May 7, 1991 the Commission concurred in the Navy's Federal Consistency Determination and, on October 8, 1991, the Commission issued its Adopted Findings on Consistency Determination. *Id.* The 1991 Commission Findings noted that its findings were premised on the assumption that construction of the NBC site would comply with the plans and guidelines developed between the City of San Diego and the Navy. The 1991 Findings concluded that "no further Commission action is required for the redevelopment to proceed as presented in the consistency determination." *Id.*

MPG moves for partial summary judgment on the ground that the NBC property is excluded from the definition of coastal zone under the CZMA and therefore defendant Commission may not require a CDP for the project. The Commission opposes the motion.

DISCUSSION

Legal Standards

A motion for summary judgment shall be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(c)*; **[*6]** *Prison Legal News v. Lehman, 397 F.3d 692, 698 (9th Cir. 2005).* The moving party bears the initial burden of informing the court of the basis for its motion and identifying those portions of the file which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* There is "no express or implied requirement in *Rule 56* that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* (emphasis in original). The opposing party cannot rest on the mere allegations or denials of a pleading, but must "go beyond the pleadings and by [the party's] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Id. at 324, 106 S. Ct. At 2553* (citation omitted). The opposing party also may not rely solely on conclusory allegations unsupported by factual data. *Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).*

The court must examine the evidence in the light most favorable to the non- moving party. *United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).* Any doubt as to **[*7]** the existence of any issue of material fact requires denial of the motion. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* On a motion for summary judgment, when "'the moving party bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence were uncontroverted at trial.'" *Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992)* (emphasis in original) (quoting *International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th Cir. 1991), cert. denied, 502 U.S. 1059, 112 S. Ct. 936, 117 L. Ed. 2d 107 (1992)*).

The Motion

The issue before the court is whether or not the NBC is excluded from CZMA's statutory definition of "coastal zone." The parties generally agree that the exclusion of the NBC from the scope of CZMA limits the Commission's ability to require a CDP. [2] Conversely, if the NBC is located within the coastal zone, then the Commission may require a CDP. The CZMA definition of coastal zone provides that the only lands "[e]xcluded from the coastal zone are those lands the use of which is by law

subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." *16 U.S.C. § 1453(1).* **[*8]** Breaking the statute into elements, the parties dispute whether the NBC is "(1) land[] the use of which (2) is by law subject solely to the discretion of . . . the Federal Government." While there is substantial overlap between these two elements, each is discussed in turn.

> 2 Even if the NBC is not subject to a CDP, in the ordinary course, the NBC is subject to the consistency provisions of CZMA. *See 16 U.S.C. §1456.*

"In construing a statute in a case of first impression, we look to the traditional signposts of statutory construction: first, the language of the statute itself; second, its legislative history, and as an aid in interpreting Congress' intent, the interpretation given to it by its administering agency," if any. [3] *Brock v. Writers Guild of Am., W., Inc., 762 F.2d 1349, 1353 (9th Cir.1985)*(internal citations omitted). The court examines "not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Children's Hosp. & Health Ctr. v. Belshe, 188 F.3d 1090, 1096 (9th Cir.1999).* If the plain meaning of the statute is unambiguous, that meaning is controlling and legislative history is not examined unless "the legislative **[*9]** history clearly indicates that Congress meant something other than what it said." *Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 877 (9th Cir.2001)* (en banc). If the statutory language is ambiguous, the court examines legislative history. *United States v. Daas, 198 F.3d 1167, 1174 (9th Cir.1999).*

> 3 The parties do not cite any authorities that have directly addressed the interpretation and application of the disputed statutory language to circumstances similar to those at bar.

The court concludes that the statutory language -- "land[] the use of which is by law subject solely to the discretion of . . . the Federal Government," *16 U.S.C. § 1453(1)* -- is sufficiently imprecise to require an examination of pertinent legislative history. As noted in its previous order on Defendant's Motion to Dismiss, on one level it could be argued that the Federal Government has exercised sole discretion over the use of the NBC project by enacting legislation, by selecting a private developer, and by working with the City to define the project's parameters. On the other hand, one could argue that both the private developer and the City exercise discretion to some degree in defining the scope **[*10]** of the project and therefore the discretion may not be "solely" with the Federal Government.

Looking to the legislative history, the Senate Report indicates that the coastal zone exclusion provision does not "extend state authority to land subject solely to the discretion of the Federal Government such as national parks, forest, and wild-life refuges, Indian reservations and defense establishments." S.Rep. 92-753, at 8 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4783. This legislative history identifies broad and diverse categories of uses of federal lands that are excluded from the CZMA even though those uses may involve significant private activities.

Lastly, in ascertaining the meaning of the statute, the court considers the interpretation given to it by its administering agency. *Brock, 762 F.2d at 1353.* Here, the Secretary of the Navy takes the position that the Commission does not possess jurisdiction to require a CDP, presumably because the NBC site falls outside CZMA's definition of coastal zone. (NOL, Exh. D at p.45, §45). This is consistent with the Secretary's view that the Commission's future role is limited to determining whether changed circumstances impact the August 21, **[*11]** 1990 consistency review. *Id.* Furthermore, National Oceanic and Atmospheric Administration ("NOAA"), the agency charged with administering the CZMA, requires that all states exclude federal lands from their coastal zones: "[t]he boundary of a State's coastal zone must exclude lands owned, leased, held in trust or whose use is otherwise by law subject solely to the discretion of the federal Government, its officers or agents." *15 C.F.R. §923.33(a).*

In light of the statutory language, legislative history, and the views of the administrative agency charged with administering CZMA, the court addresses the elements of the statute. The first element, "lands the use of which," refers to the type of use given to federal lands This is a particularly broad definition of "use" that is far broader than the terms land-use regulation or planning. Land-use regulation generally refers to the use and development of land

> which generally focus on four aspects of land use: (1) the type of use, such as whether it will be used for agricultural, commercial,' industrial, or residential purposes; (2) the density of use, manifested in concerns over the height, width, bulk, or environmental impact of the physical **[*12]** structures on the land; (3) the aesthetic impact of the use, which may include the design and placement of structures on the land; and (4) the effect of the particular use of the land on the cultural and social values of the community, . . .

Peter W. Salsich Jr., *Land Use Regulation: A Legal Analysis and Practical Application of Land Use Law* 1 (2d ed. 2003). The legislative history reveals that Congress intended an expansive view of the term "use" as Congress specifically identified such uses as "national parks, forests, and wild-life refuges, Indian reservations and defense establishments." S.Rep. 92-753, at 8. The broad brush uses identified by Congress refer to an expansive view of the term "use," and do not relate to the specific and narrow meaning given to the term "land-use."

The Commission argues that the term "use," for purposes of *16 U.S.C. §1453(1)*, must be limited "to the Navy's sole use." (Oppo. at p. 15:6). As the lease provides that MPG has exclusive use and possession over a portion of the NBC site, (NOL, Ex. D. P.31), the Commission concludes that the NBC is not limited to the "Navy's sole use." The court rejects such an argument for two reasons. First, the term "solely" **[*13]** modifies statutory language bearing on discretion, and not on use. The statute reads "land[] the use of which is by law subject solely to the discretion of . . . the Federal Government." Second, the uses identified by Congress, "national parks, forests, and wild-life refuges, Indian reservations and defense establishments," S.Rep. 92-753, at 8, frequently involve the participation of private parties. For example, the uses identified in the legislative history inevitably involve private involvement for the planning, design, operation and construction of numerous activities on federal lands such as accommodations, facilities, concessions, procurement, and services. *See e.g., 48 C.F.R. § 2.101* (an "acquisition" is defined by the Federal Acquisition Regulations as "the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease"); *16 U.S.C. §§ 1a-2(k)(1)* (Secretary of the Interior authorized to enter into leases for "the use of buildings and associated property administered by the Secretary as part of the National Park System); *10 U.S.C. §2353(a)* (authorizing military to contract **[*14]** for research and development facilities); *10 U.S.C. § 2809(a)* (authorizing Secretary to enter into contracts for the construction, management and operation of facilities on or near military installations). Consequently, the court concludes that the involvement of private parties in the design, construction, leasing and operation of a federal project is not inconsistent with a determination that the project is a "use" within the meaning of *16 U.S.C. § 1453(1)*. The design, development, and construction of the NBC site is for the express purpose of obtaining administrative facilities for the Navy's use. Pub. L. No. 99-661, §2732. This is so because the focus of *16 U.S.C. §1453(1)* is on the use of federal lands, and not the use of private parties to accomplish federal objectives.

Next, the court must determine whether the use of NBC project is subject "solely to the discretion of . . . the Federal Government." In determining whether the use or uses of the NBC fall within the sole discretion of the Federal Government, this court finds that consideration of the following factors provide an appropriate analytical framework: (1) the legislative mandate authorizing the development of NBC site; **[*15]** (2) the historic use of the property; [4] and (3) the degree of discretionary oversight exercised over the NBC at the highest agency level. The legislation authorizing the NBC provides substantial support that the Federal Government exercised sole discretion over the use of the NBC. Congress, acting through its legislative mandate, specifically provided that the Secretary of the Navy "may" enter into a long-term lease of the property and assist the private party lessees to obtain financing for the project. Pub. L. 99-661, §2732(a)(2). Congress also dictated that in consideration for a long term lease of the NBC property to a private party, the Navy would obtain, free of charge (or at minimal cost), government administrative facilities. *Id,* §2732(b). The legislation also directed that the Secretary of the Navy develop the property "in accordance with detailed plans and terms of development which have been duly formulated by the Secretary and the San Diego community through the San Diego Association of Governments' Broadway Complex Coordinating Group." *Id,* §2732(c). Moreover, the legislation specifically provides that any lease for the NBC facilities "may provide for the operation and **[*16]** maintenance of such facility by the private developer." *Id,* §2732(f).

4 In this case, the NBC site has historically been used exclusively by the Navy.

The Commission argues that the NBC is not subject to the sole discretion of the federal government because "federal law and the lease agreement adopted pursuant to federal law expressly confer significant discretionary authority over the NBC project to non-federal entities." (Oppo. at p.15:25-27). Clearly, Congress has directed the Secretary of the Navy to develop the site in accordance with the input from "the San Diego community through the San Diego Association of Governments' Broadway Complex Coordinating Group." Pub. L. 99-661, §2732(b)(C)(2). It is also true that MPG has had a substantial role in planning the contours of the NBC and will continue to do so throughout the construction and operational phases of the project. Critically, however, the community input and private planning activities are called for by the Federal Government exercising its sole discretion through legislation. Moreover, the project's parameters, in the broadest sense - as mandated by legis-

lation, specifically provide for the use of private parties to accomplish [*17] the federal objective to construct Navy administrative facilities and do not in any way undermine the Federal Government's exercise of sole discretion over the use of federal lands. The statutory requirement of 'sole discretion' relates to the fundamental and threshold determination of how the federal land at issue is to be used.

There is no doubt that MPG, and others, exercise, and will continue to exercise, substantial decision-making authority in the implementation of the project as mandated by federal legislation through the design, construction, and operation of the NBC. The decision-making of MPG, however, consists of a different species of judgment than that exercised by Congress or the Secretary of the Navy. Discretion, as commonly understood, means simply "the power or right to decide or act according to one's own judgment." *Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 958 (9th Cir. 2006)*. The Federal Government exercised its sole discretion in two ways: one legislative and the other administrative. First, on the legislative front Congress authorized the Secretary of the Navy to jointly develop the NBC, subject to the general parameters of the project as identified in [*18] the legislation. Pub. L. 99-661, §2732. Indeed, the legislative declaration was akin to a mission statement and reflects the type of discretion contemplated by CZMA. Second, the highest administrative officer, the Secretary of the Navy, exercised his discretion by, among other things, deciding to proceed with the NBC.

Finally, and not insignificantly, a narrow interpretation of the language "solely," as advocated by the Commission, has the potential to discourage, rather than encourage, federal authorities to solicit input from local planning agencies. If participation by urban planning groups, outside contractors, and concerned citizens in federal-use projects subjects the project to potentially onerous state environmental regulations (and any concomitant delay associated with a CDP), federal agencies may seek to limit the input of interested groups. Any such potential loss of the input from local planning agencies, such as that provided herein by the San Diego Association of Governments' Broadway Complex Coordinating Group. and the City of San Diego, could result in the loss of valuable intelligence, experience, insight, community involvement, and guidance. Furthermore, the court [*19] notes that the imposition of a CDP requirement in this case - - based solely upon the involvement of a lessee-developer like MPG - - may limit the Federal Government's future ability to seek innovative solutions to obtain defense establishments at ostensibly little or no cost to taxpayers.

In sum, the court concludes that the NBC is excluded from CZMA's definition of coastal zone. Consequently, the court grants summary judgement in favor of MPG, and against the Commission, on its first two claims for declaratory relief.

The *Property Clause*

Although MPG prevails on its motion for summary judgment, the court briefly addresses and rejects one argument made by MPG. To the extent MPG argues that the *Property Clause of the U.S. Constitution* prohibits a state's ability to regulate any federally owned lands, the Supreme Court in *Kleppe v. New Mexico, 426 U.S. 529, 96 S. Ct. 2285, 49 L. Ed. 2d 34 (1976)* rejected such an argument. In *California Coastal Com. v. Granite Rock Co., 480 U.S. 572, 107 S. Ct. 1419, 94 L. Ed. 2d 577 (1987)* the Supreme Court directly addressed the CZMA in context of the *Property Clause*. While the Supreme Court noted that the *Property Clause* invests unlimited power in Congress over use of federal lands, it also concluded that Congress, by [*20] enacting the CZMA, contemplated state environmental oversight over coastal zones. *Id. at 580*. Consequently, the CZMA, and not the *Property Clause*, provides the framework for analyzing environmental review issues in coastal areas.

The California Coastal Act

The Commission largely argues that the CZMA and California's Coastal Act are separate bodies of law and that the Coastal Act's definition of coastal zone is broader than CZMA's definition and includes all federal coastal lands. Because (1) the state's definition is broader than the federal one and (2) the agency responsible for overseeing the CZMA, NOAA, approved the State's 1978 amendments to the Coastal Act, the Commission concludes that the CDP requirements apply to the NBC. Even assuming that the Commission's representation about the Coastal Act's definition is a correct statement of California law, *see Cal. Pub. Resources Code §30008*, the *Supremacy Clause* trumps conflicting state laws. *See Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005)* ("The *Supremacy Clause* unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."). Consequently, the court rejects the argument that the Coastal Act's [*21] definition of coastal zone applies under the present circumstances.

Alternatively, the Commission argues that the NBC site is not excluded from the CZMA because (1) only a portion of the property will be occupied by the Navy's administrative facilities and (2) non-federal entities exercise "significant discretionary authority over the NBC project." (Oppo. at p.15:26-27). The court rejects these arguments for the following reasons, as more fully set forth above: (1) the focus of the statute is on the federal use of federal lands, and not the use of private parties to

accomplish federal objectives and (2) the Federal Government, through Congressional and agency action, acted in its sole discretion by legislative mandate and agency action to define the use of the NBC and to permit the Secretary of the Navy to jointly develop the NBC in conjunction with a private developer.

In sum, for the above stated reasons the court grant's MPG's motion for partial summary judgment, finding that the Commission does not have the authority to require a CDP for the NBC site. The court declares that the Commission may not require a CDP for the NBC. This ruling should not be interpreted by the parties to [*22] mean that the Commission cannot engage in or require further consistency review proceedings. The court expresses no opinion on that potential question and recognizes that the parties reserve their respective positions regarding such issues.

IT IS SO ORDERED.

DATED: April 25, 2008

/s/ Jeffrey T. Miller

Hon. Jeffrey T. Miller

United States District Judge

TAB 57

Department of Justice
Washington, D.C. 20530

AUG 10 1976

Mr. William C. Brewer, Jr.
General Counsel
National Oceanic and Atmospheric Administration
Rockville, Maryland 20852

Dear Mr. Brewer:

The Coastal Zone Management Act of 1972, 86 Stat. 1280, 16 U.S.C. §§1451-64 (Supp. IV, 1974) as amended by the Coastal Zone Management Act Amendments of 1976, Pub. L. 94-370 90 Stat. ____ 1/ (July 26, 1976) (the "Act") is designed to encourage the States to prepare and implement management programs, i.e., planning and regulatory programs, with respect to their "coastal zones." Subject to the more detailed definition provided by the Act, a coastal zone may generally be considered as comprising coastal waters, the land thereunder and the adjacent shorelands. The incentives which the Act provides to the States for this purpose consist of federal grants to finance a portion of their costs in developing and administering management plans. S. Rep. No. 92-753, 92d Cong., 2d Sess. 2 (1972) ("Senate Report").

You have requested our opinion concerning which lands owned by the United States are subject to the state planning and regulatory process under the Act. The pertinent provision is found in the last sentence of section 304(1) of the Act, 2/ which excludes federal lands from the definition of the Coastal Zone in the following terms:

1/ The 1976 Amendments made a number of significant changes in the Act, none of which are pertinent to the question considered herein.

2/ This section was redesignated section 304(1) by the 1976 Amendments, Pub. L. 94-370 §1, 90 Stat. ____ (July 26, 1976). This new designation is used herein.

> ... Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

You have taken the position that the only federal lands excluded from this definition are those as to which the Federal Government has "exclusive legislative jurisdiction," relying primarily on the argument that "sole discretion as to use" is intended to be synonymous with "exclusive legislative jurisdiction." The Departments of Agriculture, Defense, Interior and Transportation are of the view that all federally-owned lands used by the Federal Government for federal purposes are excluded from the Coastal Zone regardless of the character of the Federal Government's jurisdiction over such lands.

In considering this question, it is useful to bear in mind the varying sorts of jurisdiction which the Federal Government may have over lands. In this respect, Federal lands fall into four separate categories:

1. Lands over which the United States is empowered to exercise exclusive legislative jurisdiction.

This type of jurisdiction derives from Article I, section 8, clause 17 of the Constitution which provides that Congress shall have power

> To exercise exclusive Legislation in all Cases whatsoever over such District ... as may ... become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . . .

Generally speaking, the States have no jurisdiction within the "Federal enclaves" described in this clause. 3/

2. Lands over which the United States and a State exercise concurrent jurisdiction.

These are lands within a State that have been acquired by the United States by the cession or with the consent of the State but with the State retaining certain jurisdiction and authority within the boundaries of the acquired land. In general, such reservation is permitted so long as it does "not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired ...." 4/

3. Lands held by the United States as a proprietor.

With respect to these lands, the State has not ceded any jurisdiction to the United States. The authority and power of the United States over these lands derives from Article IV, section 3, clause 2 of the Constitution which provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States....

3/ See, e.g., Pacific Coast Dairy, Inc. v. Department of Agriculture of California, 318 U.S. 285, rehearing denied 318 U.S. 801 (1943); Bowen v. Johnston, 306 U.S. 19 (1939) (no criminal jurisdiction); Surplus Trading Co. v. Cook, 281 U.S. 647 (1930) (no power to tax private property); Arlington Hotel v. Fant, 278 U.S. 439 (1929) (no power to legislate with respect to enclave).

4/ James v. Dravo Contracting Co., 302 U.S. 134, 149 (1937) (land purchased with consent of the State); accord, Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885) (land acquired by State cession).

While some private activity on such lands is subject to the powers of the State, 5/ the disposition and use made of such lands by the United States has been repeatedly described as being without limitations. 6/

4. Trust lands.

Indian lands owned by the United States have been held to be owned in trust for Indian tribes or for individual Indians. 7/

The significance of the question of what federal lands are excluded from the Coastal Zone is made evident by the fact that about 95% of the land owned by the Federal Government is held in a proprietary capacity. 8/ If all federal lands, other than those over which the United States has exclusive legislative jurisdiction or trust lands, are

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5/ James v. Dravo Contracting Co., supra note 4.

6/ Kleppe v. New Mexico, -- U.S. --, 96 Sup. Ct. 2285 (1976); Alabama v. Texas, 347 U.S. 272, 274 (1954) and cases quoted therein.

7/ United States v. Chase, 245 U.S. 89, 99-100 (1917) (in trust for tribe); United States v. Bowling, 256 U.S. 484, 487 (1921) (in trust for individual Indian).

Only the Department of Interior addresses separately the question of whether lands held in trust by the Federal Government are excluded from the Coastal Zone, asserting that they are. Since §304(1) of the Act expressly provides that "lands held in trust by the Federal Government" are excluded from the definition of Coastal Zone, it appears that this view is correct. The legislative history discussed below confirms this view.

8/ U.S. Public Land Review Comm., Federal Legislative Jurisdiction, Study Report No. 1 163-4 (1969). The Department of Agriculture advises that more than 90% of the national forests are held in proprietal status. Memorandum of the Department of Agriculture, Office of General Counsel to Chief, Forest Service, Coastal Zone Management 7. (Feb. 25, 1976).

held to be included within the Coastal Zone, the States will gain a considerable degree of control over the uses of these lands pursuant to the so-called consistency requirements of section 307(c) of the Act, 16 U.S.C. §1456(c) (Supp. IV, 1974). Pursuant to section 307(c)(1) of the Act, federal activities "directly affecting" the Coastal Zone must be conducted, to the maximum extent practicable, in a manner which is consistent with the State's approved management program. If all federal lands otherwise within the Coastal Zone except those subject to federal exclusive legislative jurisdiction and trust lands are included within the Coastal Zone of the State in which such lands are situated, the State will have substantial authority over the uses made of all such lands without regard to whether the consequences of such use are confined to the federal lands or whether there is any spill-over to state lands. As noted in your submission, if the exclusionary provision is narrowly read, the consistency provisions would "assimilate a limited body of State law [the State's Coastal Zone management program] into Federal law for the purpose of governing the conduct of Federal agencies." 9/

To determine the Congressional intent with respect to the federal exclusion provision, one must first look at the plain words of the exclusionary provision in the statute. Section 304(1) of the Act provides:

> Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

9/ National Oceanic and Atmospheric Administration, Department of Commerce, Excluded Lands Paper 8 (1976).

It is your view that the extent of this exclusion is limited to those lands as to which the United States has "exclusive legislative jurisdiction" because with respect to concurrent jurisdiction lands or proprietary lands there remains the possibility of valid State action so long as such action is not inconsistent with Federal law. 10/ However, this is not true with respect to the use made by the Federal Government of federal lands, such use not being subject to regulation by the States regardless of the scope of the Federal Government's jurisdiction within the boundaries of such land. 11/ More importantly, this argument confuses discretion regarding the use of land (the statutory test for exclusion) with the constitutionally derived power to exercise exclusive legislative jurisdiction within certain geographical boundaries. Legislative power is not synonymous with the power to utilize land. This distinction has been recognized by the Supreme Court in rejecting the contention that lands of the United States within a State when not used for a governmental purpose are subject to State power to the same extent as would be lands owned privately.

> True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them . . . .

10/ Id. at 6. See text at notes 4 and 5.

11/ Constitution, Art. VI, cl. 2, the "supremacy clause;" id. Art. IV, sec. 3, cl. 2; Hunt v. United States, 278 U.S. 96 (1928); McKelvey v. United States, 260 U.S. 353 (1922); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); Ohio v. Thomas, 173 U.S. 276 (1899); Camfield v. United States, 167 U.S. 518 (1897); Fort Leavenworth R.R. Co. v. Lowe, supra note 4; McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

> And so we are of the opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use 12/

If full power to control the use of lands of the United States resides in Congress, such power must also be the sole power, for power is not full if subject to the actions of another. Thus, the plain language of the federal lands exclusion makes it clear that all federal lands are excluded from the Coastal Zone.

Even were the statutory language ambiguous, the same result would obtain for, as the Supreme Court has recently stated:

> Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of State regulation is found only where and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of State regulation "clear and unambiguous." 13/

12/ Utah Power & Light Co. v. United States, supra at 404-405 (emphasis added). In Kleppe v. New Mexico, supra note 6, the Supreme Court recently reaffirmed the unlimited nature of Congress's power over public lands in the broadest terms.

13/ Hancock v. Train, -- U.S. --, 96 Sup. Ct. 2006, 2013 (Federal installations not required to obtain State permits under Clean Air Act); accord, Environmental Protection Agency v. California ex rel. State Water Resources Control Board, -- U.S. --, 96 Sup. Ct. 2022, 2028 (1976) (Federal installations not required to obtain State permits under Federal Water Pollution Control Act Amendments of 1972).

The conclusions reached by examining the other sources of legislative intent are in accord with the plain meaning of the statute. Section 307(e) of the Act, 16 U.S.C. §1456(e) (Supp. IV, 1974) provides as follows:

> Nothing in this chapter shall be construed -
>
> (1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;
>
> (2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.

This language is not consistent with the view that the Act was intended to work a virtual revolution in Federal-State relations by vesting the States with substantial authority over the use the Federal Government makes of federal lands. 14/ The Senate Report describes this provision, originally found in section 314(d) of the bill as first passed by the Senate, as "a standard clause disclaiming intent to diminish Federal or State authority in the fields affected by the Act." Senate Report at 20. The House Report states that there is nothing in the coordination provisions of the Act "which shall be construed to diminish either Federal or State jurisdiction, responsibility or rights in the field of planning, development or control of water resources or navigable waters." House Report 92-1049, 92d Cong. 2d Sess. 20 (1972). Such language hardly seems compatible with the suggestion that the Congress intended the Act to change the long established order with respect to the use and management of Federal lands.

Similarly, the legislative history of the exclusionary sentence itself indicates that all Federal lands were intended to be excluded. The Senate Report said of section 304(1); 15/

14/ As originally passed by the Senate, this section contained an additional subsection providing that the Act was not to be construed "to change or otherwise affect the authority or responsibility of any Federal official in the discharge of the duties of his office except as required to carry out the provisions of this title." §314(d)(2), S. 3507, 118 Cong. Rec. 14190, 92d Cong. 2d Sess. (1972).

15/ Thendesignated section 304(a); see note 2, supra.

> The coastal zone is meant to include the non-Federal coastal waters and the non-Federal land beneath the coastal waters and the adjacent non-Federal shore lands including the waters therein and thereunder. Senate Report at 9.

The phrase "non-Federal land" implies that all federal lands are excluded from the Coastal Zone. The passage contains no hint of an intent to distinguish, for the purposes of this statute, between federal land subject to exclusive federal legislative jurisdiction and other federal land. The Senate Report also states that the consistency requirements do not "extend State authority to land subject solely to the discretion of the Federal Government such as national parks, forests and wildlife refuges, Indian reservations and defense establishments." Ibid. Since only a small minority of the national parks, forests and wildlife refuges 16/ are subject to exclusive federal legislative jurisdiction, the use of those examples again indicates a Congressional intent to exclude all federal lands no matter in what manner they are held by the United States. To reach the contrary result one must argue, as you do, that this sentence should be read as referring only to those national parks, forests and wildlife refuges etc. which are subject to sole federal legislative jurisdiction. In our view, such an interpretation is strained, and it would render the clear implication of the passage to the average reader misleading.

The exclusionary language was absent from the bill as first passed in the House. The Conference Committee, however, included it with the following comment:

> The Conferees also adopted the Senate language in this section which made it clear that Federal lands are not included within a State's coastal zone. H.R. Rept. No. 92-1544, 92d Cong., 2d Sess., 12 (1972) (emphasis added).

16/ See note 8, supra.

This language indicates that it was the view of the conferees that federal lands were excluded from a State's Coastal Zone even in the absence of this explicit exclusionary provision and that the Senate language merely made the exclusion clear. But the subtle distinction between proprietary and nonproprietary federal lands could hardly be considered implicit in the bill before the exclusionary language was added. The Conference Committee Report provides additional support in its section explaining the decision to vest responsibility for the program in the Department of Commerce, as provided in the Senate version, rather than in Interior, as the House had provided. In connection with this discussion the conferees noted that "those lands traditionally managed by the Department of Interior or the Department of Defense, such as parks, wildlife refuges, military reservations, and other such areas covered by existing legislation, were specifically excluded from the coverage of the bill." Id. at 13.

Finally, it is worthwhile to examine the origin of the language of the federal exclusionary provision. It seems to have first appeared as part of S. 3354, 91st Congress, a land use planning bill. Section 305(b)(1)(A) of that bill excluded from the State plan "lands the use of which is by law subject solely to the discretion of ... the Federal Government . . . ." The Report of the Senate Committee on Interior and Insular Affairs noted with respect to this provision that

> Federal lands and the Federal trust-Indian lands are excluded in order that the Federal Government's independence in the management of its lands will not be compromised. The Committee acknowledges the need for improved Federal land use policies and practices . . . . but feels that the comprehensive substantive planning responsibilities of the Federal Government with respect to Federal lands should be considered separately from the present legislation . . . . Sen. Rept. No. 91-1435, 91st Cong. 2d Sess. 38-39 (emphasis added).

In short, the plain language of the statute appears to exclude all lands owned by the United States, since the United States has full power over the use of such lands and "sole discretion" with respect to such use. This conclusion is supported by the legislative history of the Act. Nowhere is there any suggestion that Congress intended to exclude some federal land from the Coastal Zone, and hence from State regulation, while including other such land within the Zone. We might add that the results of such an intent would be whimsical; as the submission of the Department of Defense notes, by way of example, part of the Naval base at Sewells Point in Norfolk is subject to exclusive federal legislative jurisdiction, part is subject to concurrent jurisdiction and part is held in a purely proprietary capacity. 17/

Accordingly, it is my opinion that the exclusionary clause excludes all lands owned by the United States from the definition of the Coastal Zone.

Sincerely,

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

17/ Department of Defense, Position on Federal Lands Exclusion of the Coastal Zone Management Act Appendix. (1976).

CERTIFICATE OF SERVICE

The undersigned declares:

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action; my business address is c/o Nossaman, Guthner, Knox & Elliott, LLP, 18101 Von Karman Avenue, Suite 1800, Irvine, California 92612-0177.

On May 16, 2008, I served the foregoing **Notice of Additional Authority** on parties to the within action as follows::

Via Federal Express: **One hard copy** of the Notice of Additional Authority to:

Jamee Jordan Patterson
Supervising Deputy Attorney General
Office of the Attorney General
110 West A Street, Suite 1100
San Diego, CA 92101
Tel: (619) 645-2023
Fax: (619) 645-2012
E-mail: jamee.patterson@doj.ca.gov

Via Federal Express: **One electronic copy** of the Notice of Additional Authority to:

John A. Saurenman
Supervising Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Tel: (213) 897-2702
Fax: (213) 897-2801
E-mail: john.saurenman@doj.ca.gov

Via Federal Express: **One electronic copy** of the Notice of Additional Authority to:

Hope Schmeltzer, Chief Counsel
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105
Tel: (415) 904-5220
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E-mail: hschmeltzer@coastal.ca.gov

☒ (By Overnight Service) I served a true and correct copy by overnight delivery service for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.

☒ (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

☒ Executed on May 16, 2008.

Stephanie Drysdale

CERTIFICATE OF PERSONAL SERVICE

I, the undersigned, declare:

I am over the age of 18 years, employed in the District of Columbia, and am not a party to the above-entitled cause. My business address and place of employment is: **Same Day Process Service,** 1322 Maryland Ave. NE, Washington, DC 20002.

Consistent with 15 C.F.R. § 930.127, on May 16, 2008, I served the following document(s) **Notice of Additional Authority** on the person(s) hereinafter mentioned by personally delivering a true copy thereof to a person accepting service as follows:

U.S. Secretary of Commerce
Herbert C. Hoover Building
14th Street and Constitution Avenue,
NW
Washington DC 20230

Executed on May 16, 2008.

☒ (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

_____	_____
(Printed Name)	(Signature)

CERTIFICATE OF PERSONAL SERVICE

I, the undersigned, declare:

I am over the age of 18 years, employed in the District of Columbia, and am not a party to the above-entitled cause. My business address and place of employment is: **Same Day Process Service**, 1322 Maryland Ave. NE, Washington, DC 20002.

Consistent with 15 C.F.R. § 930.127, on May 16, 2008, I served the following document(s) **Notice of Additional Authority** on the person(s) hereinafter mentioned by personally delivering a true copy thereof to a person accepting service as follows:

Office of the General Counsel for
Ocean Services, NOAA
1305 East West Highway
SSMC-4, Room 6111
Silver Spring, MD 20910
Tel: (301) 713-2967
Fax: (301) 713-4408

Executed on May 16, 2008.

☒ (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

(Printed Name)	(Signature)